Filed 1/28/10 In re L.B. CA5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re L.B., a Person Coming Under the Juvenile Court Law.	
FRESNO COUNTY DEPARTMENT OF CHILDREN & FAMILY SERVICES, Plaintiff and Respondent, v. B.B., Defendant and Appellant.	F058221 (Super. Ct. No. 04CEJ300172-2) **OPINION**

THE COURT[*]

APPEAL from an order of the Superior Court of Fresno County. Jane A. Cardoza, Judge.

Maureen L. Keaney, under appointment by the Court of Appeal, for Defendant and Appellant.

Kevin Briggs, Interim County Counsel, and William G. Smith, Deputy County Counsel, for Plaintiff and Respondent.

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* Before Vartabedian, A.P.J., Gomes, J., and Kane, J.

B.B. (father) appeals from a July 2009 order terminating parental rights (Welf. & Inst. Code, § 366.26) to his daughter, L. who was then three years old.[1] He contends this court should reverse the termination order because: respondent Fresno County Department of Children and Family Services (department) and the court failed to ask him, pursuant to the Indian Child Welfare Act (ICWA; 25 U.S.C. § 1901 et seq.), whether he had any Indian ancestry; and the court should have found termination would be detrimental to the child based on their parent/child relationship. Father also joins in arguments raised by the child's mother in her appeal (*In re C.F. et al.*, F058193).

On review, we affirm. Neither of father's contentions warrants reversal. His ICWA argument is untimely (*In re Pedro N.* (1995) 35 Cal.App.3th 183), not to mention he overlooks his express denial of having any Indian ancestry. In addition, the court did not abuse its discretion by rejecting father's claim of detriment. As for father's joinder in the mother's appeal, he is also not entitled to relief. In the mother's appeal, we concluded her arguments were meritless.

PROCEDURAL AND FACTUAL HISTORY

In April 2008, the department detained two-year-old L. and her older half-sibling because the children were at substantial risk of being sexually abused (§ 300, subd. (d)) by their mother's male friend who was a member of the children's household. He was a registered sex offender. Although the mother was informed that the man could not have any contact with children, she continued to allow him access to the children. In the meantime, father was incarcerated in state prison (CDC) and had not made any provision for L.'s care. (§ 300, subd. (g).)

In its May 2008 detention report, the department disclosed the mother signed a declaration denying any Indian ancestry while father had not been questioned on the

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[1] All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

subject "due to his incarceration." The department repeated this statement in its June 2008 jurisdictional report.

Father was transported to and attended a scheduled June 2008 jurisdictional hearing. He was then incarcerated in CDC at Wasco. He had been sentenced in April 2008 to a three-year prison term based on his plea to multiple 2007 identity theft charges (Pen. Code, § 530.5, subd. (a)) and a prior prison term enhancement (Pen. Code, § 667.5, subd. (b)).[2] His earliest projected release date was in late August 2009.

During the June 2008 jurisdictional hearing, father's court-appointed attorney stated for the record that she would "provide an ICWA form, but he reports there is no native American Indian ancestry." That same day, the attorney filed a "PARENTAL NOTIFICATION OF INDIAN STATUS" form on father's behalf stating "I have no Indian ancestry as far as I know."

Father's counsel also requested visitation while father was in local custody. Although the court authorized supervised visitation at the Fresno County Jail if appropriate, the department subsequently asked to suspend jail visits until father was released because L. was only two years old.

For a variety of reasons not relevant to this appeal, the Fresno County Superior Court was unable to conduct its jurisdictional hearing until October 2008. Father, who was transported to and attended the October hearing, waived his trial rights and submitted to the petition. The court thereafter found the petition's allegations under section 300, subdivisions (d) and (g) true and set the matter for a dispositional hearing. While in local custody for the October jurisdictional hearing, father had a jail visit with L. and her half-sibling.

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[2] Father's felony conviction record dated back to the 1990's for theft and drug-related crimes.

The dispositional hearing was also repeatedly continued for a number of reasons, including counsel's difficulty in securing father's presence. Father had been transferred twice, first to CDC in Chowchilla and later to CDC in Corcoran.

Eventually in February 2009, the court conducted its dispositional hearing. At that hearing, father testified. Relevant to this appeal, he reported he had been in custody since January 9, 2008. He attributed his current imprisonment to having "started using drugs again." He had had a drug problem approximately four years earlier "when I got out last time."

Before January 2008, father lived with the mother. Following his arrest, the mother brought L. and her half-sibling to visit once a week at the jail. Since the children's detention, he has seen them once at the Fresno County Jail. He described the 30-minute visit as excellent. The children were very excited to see him. They used a telephone to talk with father. They both knew who he was. He did not believe his bond with L. and his step-child had diminished since he had been in custody.

At the hearing's conclusion, the court adjudged L. and her half-sibling dependent children and removed them from parental custody. The court also found the children did not come within the provisions of ICWA. In addition, the court denied the parents any reunification services.

The court found with regard to father that services would be detrimental to L. under § 361.5, subd. (e)(1). This finding was based on the child's young age, the interrupted bond, if any, that existed between father and L. due to his incarceration, the length of his prison term (making it unlikely he could make significant progress within the six-month reunification timeframe for a child as young as L.), the nature of father's crimes, and the fact that L. had not asked about father since she last saw him in the fall of 2008. The court also did not make any order for visitation between father and L.

The court concluded by setting a section 366.26 hearing to select and implement a permanent plan for L. and her half-sibling. Although father subsequently filed a notice of intent to seek extraordinary writ review of the court's rulings, he never pursued the matter by filing a writ petition. (*B.B. v. Superior* Court, F057082, (dismissal order).)

In advance of the section 366.26 hearing, the department submitted a written report in which it recommended the court find three-year-old L. and her half-sibling were likely to be adopted and order parental rights terminated. Because the likelihood of L.'s adoption is undisputed, we do not summarize the evidence on that point here.

According to the department's report, L. had two visits with father over the course of her dependency, the first in October 2008 and the second in June 2009. The social worker, who prepared the department's written report, described the June 2009 visit between L. and father at the Fresno County jail in the following terms:

> "Before the visit, [L.] appeared to be excited about visiting with [father] at jail as she was questioning this Social Worker about which jail building to go to this time. When [father] arrived, [L.] was smiling and seemed to be eager to talk to her father as she was jumping up and down from her seat and pointing at her father. During the visit, [L.] was talking to her father about her toys, [C.'s] birthday party, what she learned in school, and what she did with other foster family members. [L.] was talkative and she repeated, 'I love you too, [father], I like you with all of my heart.' [L.] told her father that she would like purple flowers for her birthday. Towards the end of the visit, [L.] got off her seat and moved around, played with other phone, and wasn't paying much attention to her father. The entire visit lasted about 30 minutes."

The court conducted the section 366.26 hearing in July 2009. Father testified about the jail visit he had with L. in June. L. recognized him immediately and said she wanted to go home. He interpreted her remarks to mean "she wanted [him] to pick her up and take her home right then." There was a glass wall between them during the visit. L. kissed the glass and wanted him to pick her up. Her behavior demonstrated to him that they had a strong parent-child bond. Since then, they had shared one more visit. Her

behavior did not demonstrate to him that there was anything different about their relationship.

Father also testified that terminating L.'s relationship with him would be detrimental to her because he was her father and he did not see any advantage to adoption. Also, father claimed L. was once very happy and now she was not. Father testified he had two other daughters who maintained contact with L. and told him L. was very quiet and withdrawn.

In closing argument, father's attorney urged the court not to terminate parental rights based on the father's testimony. The court thereafter found L., as well as her half-sibling, adoptable and terminated parental rights.

DISCUSSION

I. ICWA

Father contends there was a total failure by both the department and the court to inquire whether he had Indian ancestry and therefore we must reverse pursuant to ICWA. In crafting his argument, however, he overlooked the form his trial attorney completed in June 2008 in which father did not claim any Indian ancestry. Father nevertheless maintains that this court should address statements made in the department's reports that no inquiry was made of him "due to his incarceration." In his view, such statements were improper.

Father's argument fails for at least two reasons. First, the court found ICWA did not apply to L.'s dependency when it issued its February 2009 disposition. Thus, the time for father to raise his ICWA compliance issue has passed. (*Pedro N.*, *supra*, 35 Cal.App.4th at p. 185.) Second, even assuming arguendo the department erred by citing father's incarceration as an excuse for not making an ICWA inquiry, such an error was harmless because father informed the court in June 2008 that as far as he knew he had no Indian ancestry. (*In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1430.)

II. Termination was not Detrimental

Father also argues there was insufficient evidence to support terminating his parental rights. According to him, he visited L. and assumed a parental role with her to the extent permitted by these proceedings as well as shared a significant, positive relationship with her such that she would suffer detriment. Once again, we conclude father's argument is not persuasive.

First, he relies on an incorrect standard of review. Although section 366.26, subdivision (c)(1)(B) acknowledges termination may be detrimental under specifically designated circumstances, a finding of no detriment is not a prerequisite to the termination of parental rights. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1347.) The statutory presumption is that termination is in the child's best interests and therefore not detrimental. (§ 366.26, subd. (b); *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343-1344.) Rather, it is the parent's burden to show that termination would be detrimental under one of the statutory exceptions. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.) Thus, when a court rejects a detriment claim and terminates parental rights, the appellate issue is not whether substantial evidence exists to support the court's rejection of the detriment claim, as father argues, but whether the juvenile court abused its discretion in so doing. (*In re Jasmine D., supra,* 78 Cal.App.4th at p. 1351.)

Second, the court did not abuse its discretion because father did not meet his burden to show termination would be detrimental to L. under the beneficial parent/child exception in section 366.26, subdivision (c)(1)(B)(i). This exception involves a two-part test, first, did the parent maintain regular visitation and contact with the child and second, would the child so benefit from continuing the relationship with the parent that it would outweigh the benefit of adoption. (§ 366.26, subd. (c)(1)(B)(i); *In re Lorenzo C., supra,* 54 Cal.App.4th at p. 1342.)

In this case, the court could properly find that father met neither part of this test. First, the father did not establish that he maintained regular visitation and contact with L. Instead, he had a total of three visits with L. over the course of her dependency and introduced no evidence that he made any effort to maintain regular contact with her despite his incarceration. In any event, the three pleasant visits he had with the child did not compel a finding by the court that father and L. shared such a strong relationship that termination would be detrimental.

Since contact between parent and child generally confers some benefit on a child, the parent must demonstrate more than pleasant visits or even frequent and loving contact. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 953-954.) For the beneficial relationship exception to apply,

> "the parent-child relationship [must] promote the well-being of the child to such a degree that it outweighs the well-being the child would gain in a permanent home with new, adoptive parents. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) A juvenile court must therefore: 'balance [] the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated.' (*Id*. at p. 575.)" (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1342.)

Father introduced no evidence that L.'s relationship with him outweighed the well-being she would gain in a permanent home through adoption. At most he testified he did not see any advantage to adoption, ignoring in the process L.'s interests in permanency and stability. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) In addition, there was no evidence that L. would be greatly harmed by termination of father's parental rights. We note that at trial father cited hearsay statements his other daughters purportedly made regarding L.'s change in demeanor. The court properly could have given such hearsay evidence little or no weight. In addition, the court could properly take into account L.'s

very young age and the prospect of a less than permanent and stable placement for the great majority of her childhood if parental rights were preserved as well as father's propensity for running afoul of the law and being incarcerated. We therefore conclude the juvenile court properly exercised its discretion in rejecting father's detriment claim.

DISPOSITION

The order terminating parental rights is affirmed.